

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION

In the Matter of the Petition for Arbitration of an)		
Interconnection Agreement Between))	
LEVEL 3 COMMUNICATIONS, LLC.))	
and))	DOCKET NO. UT-023043
CENTURYTEL OF WASHINGTON, INC.,))	
Pursuant to 47 U.S.C. Section 252))	

**CENTURYTEL’S PETITION FOR COMMISSION REVIEW
OF ARBITRATOR’S REPORT AND DECISION**

Pursuant to paragraph 42 of the Fifth Supplemental Order in this docket, CenturyTel hereby petitions the Commission to review and modify the Arbitrator’s Report and Decision issued January 2, 2003. CenturyTel submits that the Arbitrator’s Report and Decision makes serious mistakes in law in requiring that traffic identified in the record in this proceeding be exchanged on a bill and keep basis under a Section 251/252 arbitrated interconnection agreement. The Arbitrator’s Decision mistakenly concludes that interexchange ISP bound traffic should be exchanged pursuant to a Section 251 interconnection agreement. The Arbitrator’s Decision further mistakenly concludes that the FCC’s *ISP Remand Order*¹ requires that such interexchange traffic be exchanged on a bill and keep basis. CenturyTel also challenges the Commission’s

¹ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-carrier Compensation for ISP-Bound Traffic, Order on Remand and Report and Order*, 16 FCC Rcd. 9151, 9188, ¶ 81 (2001) (“*ISP Order on Remand*”), remanded *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002) (“*WorldCom*”).

conclusion that it has jurisdiction to conduct an arbitration between CenturyTel and Level 3.²

I. **The traffic at issue in this proceeding is exclusively interexchange traffic.**

In describing the traffic at issue in this proceeding, the Arbitrator's Decision almost gets it right. Paragraph 18 of the Arbitrator's Decision states:

18 The issues in this proceeding involve traffic that would originate on CenturyTel's telephone network when a CenturyTel customer dials a seven-digit telephone number, using so-called virtual NXX capability, to connect to the customer's chosen ISP. Level 3 would route the call over its network to the ISP's modem bank that may be physically located in another exchange or even in another state. The ISP then routes the call to one or more Internet sites during the course of the customer's Internet session.

Instead of stating that "Level 3 would route the call over its network to the ISP's modem bank that may be physically located in another exchange or even in another state;" the Decision should have stated that "Level 3 would route the call over its network to the ISP's modem bank that "will" be physically located in another exchange or even in another state."

The record in this proceeding firmly established that in all instances these calls would be interexchange. In each instance, the ISP modem bank to which Level 3 would deliver the traffic would not be in the same local calling area as the CenturyTel customer placing the call. That is the whole point of Level 3's proposed service; to allow it to carry and deliver interexchange traffic without having to pay access charges to the originating local exchange carrier.

² *In the Matter of the Petition for Arbitration of an Interconnection Agreement Between Level 3 Communications, LLC and CenturyTel of Washington, Inc. Pursuant to 47 U.S.C. Section 252, Docket No. UT-023043, Third Supplemental Order Confirming Jurisdiction (Oct. 25, 2002).* The order did not provide for procedures to challenge the finding; thus, CenturyTel's objections to the Commission's finding of jurisdiction are contained herein.

Level 3 kept the location of its ISP customers a mystery throughout much of the proceeding. The company never once mentioned the location of those customers in its pre-filed testimony. However, at the hearing the truth became known. The Level 3 ISP customers receiving calls from CenturyTel customers would not be located in the same local calling area. The calls would be interexchange. The record shows that the Level 3 ISP customers would most likely be located in Seattle since that is where Level 3's switch is (Tr. 132). However, Level 3 would not rule out the possibility that its service might provide calls from CenturyTel customers in the state of Washington to a Level 3 customer in Denver, Colorado (Gates, Tr. 46; Hunt Tr. 144, 150).

There was absolutely no basis in the record to conclude that there was any likelihood that calls from the CenturyTel customer to the Level 3 ISP customer modem bank would ever be completed within the local calling area. A more thorough discussion of the record evidence as to the interexchange nature of the traffic at issue is included in CenturyTel's Post-Hearing Brief at pages 3 – 7. CenturyTel wishes to incorporate arguments from its Post-Hearing Brief in this Petition and therefore a copy is attached hereto for ease of reference.

In order to be consistent with the record, the Arbitrator's Decision should have stated that the traffic at issue will be delivered to ISP customers that "will" be located outside of the local calling area instead of "may" be located outside of the local calling area. In any event, to the extent that the Arbitrator's decision applies to any interexchange traffic, it is in error. As will be discussed below, there is no legal basis to make interexchange traffic (even ISP-bound interexchange traffic) subject to a Section 252 arbitrated interconnection agreement.

II. **The dividing line between traffic subject to access charges and that subject to Section 251 interconnection remains valid, but has been ignored in the Arbitrator's decision.**

Since passage of the 1996 Telecommunications Act telecommunications traffic passing between two carriers has consistently been placed into one of two categories with respect to its use of the local exchange carrier networks, and the intercarrier compensation associated with that use. Interexchange traffic is subject to access charges. Local traffic is subject to local interconnection reciprocal compensation set forth in Section 251 (b) (5) of the Act. The FCC described this bifurcation as follows in its pending rulemaking docket examining issues concerning the differences in the access charge and local interconnection compensation mechanisms:

... access charge rules ... govern the payments that interexchange carriers (“IXCs”) ... make to LECs to originate and terminate long-distance calls; and reciprocal compensation rules ... govern the compensation between telecommunications carriers for the transport and termination of local traffic.³

The FCC has consistently held that Section 251 local interconnection provisions do not apply to interexchange traffic. According to the FCC, “[a]ll carriers (including those traditionally classified as IXCs) may obtain interconnection pursuant to section 251(c)(2) for the purpose of terminating calls originating from their customers residing in the *same telephone exchange* (i.e., non-interexchange calls).”⁴ Significantly, the FCC has concluded that “an IXC that requests interconnection solely for the purpose of originating or terminating its interexchange traffic, not for the provision of telephone exchange

³ Notice of Proposed Rulemaking In the Matter of Developing a Unified Intercarrier Compensation Regime, FCC 01-132, CC Docket No. 01-92, rel. April 27, 2001 (“Unified Intercarrier Compensation NPRM”), at paragraph 6.

⁴ In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, First Report and Order, 11 FCC Rcd 15499, 15598 ¶ 190 (“Local Competition Order”).

service and exchange access to others, on an incumbent LEC's network is not entitled to receive interconnection pursuant to section 251(c)(2).”⁵ Specifically with regard to intercarrier compensation, the FCC determined in the *Local Competition Order* that the reciprocal compensation provisions of section 251(b)(5) applied only to “local” traffic rather than to transport and termination of interexchange traffic.⁶

As is discussed above, the record in this proceeding clearly indicates that Level 3 is seeking access to CenturyTel's network solely for the purpose of terminating interexchange calls. All calls placed by CenturyTel end users will terminate to Level 3 customers located outside of the exchange and outside of the local calling area. Under the FCC's still valid bifurcated approach, these interexchange calls are subject to access charges and not the reciprocal compensation provisions reserved for local interconnection and exchange of local traffic.

The Arbitrator's Decision ignores this still valid bifurcation and improperly moves Level 3's interexchange traffic from one category to the other. The Arbitrator's Decision removes Level 3's interexchange traffic from the access charge regime and instead makes it subject to a Section 251 interconnection agreement that imposes bill and keep as the intercarrier compensation mechanism. There is absolutely no legal basis for this action. In doing so, the Arbitrator relies solely upon his reading of the FCC's *ISP Remand Order*. As is discussed below, the Arbitrator's decision misinterprets and misapplies the *ISP Remand Order*.

⁵ *Id.* at 15598 ¶ 191.

⁶ *Implementation of the Local Competition Provisions of in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Radio Service Providers* CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC rcd15499, (1996).

III. The ISP Remand Order provides no basis for subjecting interexchange ISP-bound traffic to “bill and keep” intercarrier compensation in a Section 251/252 interconnection arbitration.

The Arbitrator’s Decision did not bring Level 3’s interexchange ISP-bound traffic within the definition of “Local Traffic.” The Arbitrator’s Decision adopted the following definition of local traffic (finding at paragraph 31, text at paragraph 23):

Traffic that is originated by an end user of one Party and terminates to the end user of the other Party within CenturyTel’s then current local serving area, including mandatory local calling arrangements. A mandatory local calling area arrangement, ordered by the Commission, is an arrangement that provides end users a local calling area, Extended Area Service (EAS) or Extended Community Calling (ECC), beyond their basic exchange serving area. Local Traffic does not include optional local calling area’s (i.e., optional rate packages that permit the end user to choose a local calling area beyond their basic exchange serving area for an additional fee), referred to hereafter as “optional EAS”. Pursuant to applicable law, Local Traffic excludes ISP-bound Traffic for purposes of intercarrier compensation.

The definition excludes interexchange ISP-bound traffic from “local traffic” because it does not originate and terminate to an end user within CenturyTel’s local serving area or local calling area. Local ISP-bound traffic, had there been any, would meet the Arbitrator’s Decision’s definition of local traffic because it would have terminated within CenturyTel’s local calling area. The definition also further excludes ISP-bound traffic from the definition of local traffic for purposes of intercarrier compensation. This additional exclusion from the definition applies only to local ISP-bound traffic because interexchange ISP-bound traffic was already outside of the definition of local traffic. One would not apply an exclusion to a category that was never included in the first instance.

Even though interexchange ISP-bound traffic does not meet the definition of local traffic adopted in the Arbitrator's decision, the Decision none-the-less proceeds to subject that traffic to the Section 251/252 agreement and to impose intercarrier compensation terms to that traffic in the form of bill and keep (see paragraph 37 adopting language for Mutual Compensation). The Arbitrator's Decision effectively concludes that the *ISP Remand Order* brought interexchange ISP-bound traffic within the scope of Section 251/252 interconnection with the result being that all ISP-bound traffic would be subject to intercarrier compensation established in the arbitrated agreement. The Arbitrator's Decision was clearly in error in this regard because, in fact, the *ISP Remand Order* did quite the opposite. The *ISP Remand Order* removed a category of traffic from the body of traffic previously subject to Section 251 (b) (5). Therefore it removed traffic from, and did not add traffic to the body of traffic subject to Section 251 (b) (5). The *ISP Remand Order* removed local ISP-bound traffic from Section 251/252 interconnection such that no ISP-bound traffic would thereafter be subject to intercarrier compensation established by state commission imposition of a Section 252 arbitration.

Obviously, the most authoritative interpretation of the *ISP Remand Order* is the D.C. Circuit Court of Appeals decision that reviewed the FCC's decision.⁷ In the opening paragraph of the decision, the D.C. Circuit Court states:

In the order before us the Federal Communications Commission held that under s 251 (g) of the Act it was authorized to "carve out" from section 251 (b) (5) calls made to internet service providers ('ISPs') located within the caller's local calling areas.

The Arbitrator's Decision completely disregards this language as well as the specific references in the *ISP Remand Order* limiting the Order to calls made to ISPs located

⁷ *WorldCom v. FCC*, 288 F.3d 429, 430 (D.C. Cir. May 3, 2002)

within the same local calling area as that customer accessing the Internet. It is revealing to note that the Court spoke only of the FCC carving out local ISP-bound traffic and did not speak of carving out interexchange ISP-bound traffic. That is because there was no need for the FCC to carve out interexchange ISP-bound traffic because it was understood that such traffic never had been subject to intercarrier compensation under Section 251/252. Interexchange ISP-bound traffic has always been, and still is subject to access charges. Any person today can call the number assigned to an ISP not located in the caller's local calling area. Such traffic has always been subject to access charges. Whether calls to an ISP located in the same local calling area were subject to reciprocal compensation, on the other hand, up to the point of the *ISP Remand Order*, had been determined by the state commissions. As the Court noted, that changed with the *ISP Remand Order*.

The *ISP Remand Order* carved out a category of traffic (local ISP-bound traffic) from imposition of intercarrier compensation under Section 251 (b) (5).⁸ The *ISP Remand Order* did not add any categories of traffic to the Section 251/252 process and it certainly did not bring interexchange ISP-bound traffic under that process. There is no basis for the Arbitrator's Decision to conclude that the *ISP Remand Order* somehow brought interexchange ISP-bound traffic under the WUTC's authority to impose intercarrier compensation terms under Section 251/252.

The Arbitrator's Decision at paragraph 35 concludes that the FCC asserted control of intercarrier compensation for all ISP-bound traffic in the *ISP Remand Order*.

CenturyTel does not quarrel with this conclusion. However, it must be noted that the

⁸ The D.C. Circuit Court's decision rejected the FCC's rationale for carving out local ISP-bound traffic. However, the Court did not reverse the action and left the carve-out itself in place. *WorldCom v. FCC*, 288 F.3d 429, 430 (D.C. Cir. May 3, 2002)

FCC asserted control over intercarrier compensation for all ISP-bound traffic under Section 201 of the Act and not under Sections 251/252.

The *ISP Remand Order* is replete with statements indicating that the FCC was asserting authority to regulate intercarrier compensation for ISP-bound traffic under its Section 201 authority and not under Section 251/252.

Having found that ISP-bound traffic is excluded from section 251 (b) (5) by section 251 (g), we find that the Commission has authority pursuant to section 201 to establish rules governing intercarrier compensation for such traffic.⁹

* * *

For the foregoing reasons, consistent with our longstanding precedent, we find that we continue to have jurisdiction under section 201, as preserved by section 251 (f), to provide a compensation mechanism for ISP-bound traffic.¹⁰

* * *

Having concluded that ISP-bound traffic is not subject to reciprocal compensation obligations of section 251 (b) (5), we must now determine pursuant to our section 201 authority, what compensation mechanism is appropriate when carriers collaborate to deliver calls to ISPs.¹¹

Unlike Sections 251/252, when communication cannot be reliably separated, as is the case with ISP-bound traffic, regulation under Section 201 is strictly under the province of the FCC and not the state commission. Therefore when the FCC in the *ISP Remand Order* asserted jurisdiction over intercarrier compensation related to ISP-bound traffic under Section 201, it henceforth preempted state commissions from imposing intercarrier compensation terms related to such traffic under Section 251/252.

Because we now exercise our authority under section 201 to determine the appropriate intercarrier compensation for ISP-bound traffic, however, state commissions will no longer have authority to address this issue.¹²

⁹ *ISP Remand Order*, at paragraph 52.

¹⁰ *ISP Remand Order*, at paragraph 65

¹¹ *ISP Remand Order*, at paragraph 66

¹² *ISP Remand Order*, at paragraph 82

This preemption was left undisturbed by the D.C. Circuit Court in its remand order and has been recognized by the WUTC in its earlier order in this docket.¹³

Therefore, it is a mistake in law for the Arbitrator's Decision to rely on the *ISP Remand Order* as the basis for subjecting interexchange ISP-bound traffic to a Section 251/252 arbitrated agreement and in that same arbitration impose the terms of intercarrier compensation for that traffic.

A more detailed presentation of arguments showing that interexchange ISP-bound traffic is not subject to the Section 251/252 process was included in CenturyTel's earlier briefs on the jurisdictional issues submitted in this docket.¹⁴ Specifically, CenturyTel argued that the FCC preempted the states from regulating ISP-bound traffic under 47 U.S.C. §§ 251 and 252. CenturyTel incorporates its jurisdictional arguments in this Petition and attaches those briefs for ease of reference.

CenturyTel notes that since the submission of its earlier briefs on this issue, the Colorado Public Utilities Commission has taken up this very same question. In CPUC Docket No. 02B-408T, Level 3 proposed to offer the same interexchange ISP-bound traffic service that it is proposing in this proceeding. On November 1, 2002, the Administrative Law Judge in the Colorado proceeding issued a recommended decision dismissing the matter on the basis that Level 3's proposed service was not properly subject to the Section 251/252 interconnection and arbitration process.¹⁵ The full

¹³ Docket No. UT-023043, Third Supplemental Order Confirming Jurisdiction, October 25, 2002

¹⁴ Brief of CenturyTel on Jurisdictional Issues, submitted October 7, 2002; and Reply Brief of CenturyTel on Jurisdictional Issues, submitted October 15, 2002.

¹⁵ *In the Matter of the Petition of Level 3 Communications, LLC for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 with CenturyTel of Eagle, Inc. Regarding Rates, Terms, and Conditions for Interconnection*, Recommended Decision of Administrative Law Judge Dale E. Isley Granting Motion to Dismiss Petition, Decision No. R02-1242 (Nov. 1, 2002)

Colorado Commission heard oral argument from the parties on the issue on January 8, 2003. On January 17, 2003 the full Colorado Commission affirmed the recommended decision dismissing the proceeding.¹⁶

Similarly, the Arbitrator's Decision in this case had no basis for subjecting Level 3's proposed interexchange ISP-bound service to a Section 252 arbitration and there is no basis in fact or law for imposing the terms of intercarrier compensation for such traffic within the context of a Section 252 proceeding. Therefore, the Commission should reject the Arbitrator's Decision.

Even if it is determined that the FCC did not remove all ISP-bound traffic from the Section 251/252 process, Level 3 has sought interconnection with CenturyTel's network only under § 251(a). Section 251(a), however, does not obligate CenturyTel to transport and terminate Level 3's ISP traffic. Furthermore, not all interconnection arrangements are subject to Section 252 arbitration and review. For example, intrastate and interstate access arrangements for the termination and origination of interexchange traffic, as is the case here, are not arbitrated and reviewed by the state commissions pursuant to Section 252. Section 252(a) contemplates that interconnection agreements subject to state commission review under Section 252(e) will address Section 251(b) and (c) interconnection issues. In this case, Level 3 only has sought interconnection pursuant to Section 251(a). Significantly, Section 252 does not give state commissions authority to arbitrate an interconnection dispute involving Section 251(a) interconnection. Specifically, Level 3 claims that "Section 252(a) only refers to a request for interconnection negotiations under § 251, without reference to any subsection of § 251."

¹⁶ The Colorado Commission deliberated and voted to affirm dismissal of the proceeding by a 3 –0 vote. A written order is expected to be prepared and distributed in the next couple of weeks.

To the contrary, Section 252(a) makes specific reference to subsections (b) and (c) of Section 251. Section 252(a) provides, in relevant part, that:

Upon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement . . . without regard to the standards set forth in *subsections 251(b) and (c) of Section 251*. . . . The agreement . . . shall be submitted to the State commission under subsection (e) of this section.¹⁷

Thus, Section 252(a) contemplates that interconnection agreements subject to state commission review under Section 252(e) will address Section 251(b) and (c) interconnection issues, even if the parties ultimately decide to enter into an arrangement that does not track the Act precisely. The provision makes no specific reference to interconnection pursuant to Section 251(a). Under the language of Section 252(a), the state commissions may arbitrate issues related to Section 251(b) or Section 251(c)-type interconnection.

The statutory language in Section 252(d) further supports this position.

That provision sets forth pricing standards for interconnection made only pursuant to Sections 251(b)(5) and 251(c)(2)–(4).¹⁸ None of these interconnection provisions applies to the current negotiations in which Level 3 has sought interconnection pursuant to Section 251(a). Notably, there are no pricing standards for Section 251(a) contained in Section 252(d). It was not contemplated that Section 251(a) interconnection agreements would be reviewed by a state commission under Section 252(e). Even if Section 252 were interpreted more broadly to give state commissions authority to review an agreement involving Section 251(a) interconnection, such an agreement would be limited

¹⁷ 47 U.S.C. § 252(a).

¹⁸ 47 U.S.C. § 252(d).

to terms regarding the physical linking of the carriers' networks. As CenturyTel has argued throughout this proceeding, Section 251(a) only requires telecommunications carriers to provide direct or indirect physical links between themselves and other carriers; nothing more. As a result, any Section 251(a) interconnection agreement would be limited to issues involving the physical linking of CenturyTel's and Level 3's networks and would not address the exchange of traffic. For these reasons, the Arbitrator's Decision should be rejected by the Commission.

IV. The Arbitrator's Decision's action in imposing intercarrier compensation terms on ISP-bound traffic violates this Commission's Third Supplemental Order issued earlier in this docket.

There is no question that the Arbitrator's Decision directly imposes intercarrier compensation terms on ISP-bound traffic that would be exchanged between CenturyTel and Level 3. At paragraph 37, the Decision imposes language, over CenturyTel's objections, stating that: "ISP-Bound traffic shall be subject to a Bill-and-Keep arrangement." As a consequence, the Arbitrator's Decision would have the Commission, in the context of a Section 252 arbitration, impose a particular form of intercarrier compensation on interexchange ISP-bound traffic.

As has been discussed previously, the matter of intercarrier compensation for ISP-bound traffic is an area where the FCC has assumed exclusive jurisdiction under Section 201 of the Act. This Commission has recognized this as evidenced by the language in its Third Supplemental Order in this docket:

The Commission determines that the FCC's ISP Remand Order does not preempt our jurisdiction to arbitrate issues regarding CenturyTel's obligation to interconnect with Level 3 to facilitate ISP-bound traffic. The FCC preempted

only the Commission's authority to arbitrate the compensation for ISP-bound traffic. (emphasis added)¹⁹

The Commission has clearly stated that the FCC preempted the Commission's authority to arbitrate the intercarrier compensation for ISP-bound traffic. Yet, in the face of this, the Arbitrator's Decision arbitrates intercarrier compensation for ISP-bound traffic. In an arbitration decision, the Arbitrator has imposed language that specifies and mandates a particular form of intercarrier compensation for ISP-bound traffic passing between the parties. This cannot be categorized as anything other than "arbitrating compensation for ISP-bound traffic." One party claimed that bill and keep would be appropriate terms for such compensation. The other party argued that bill and keep would not be appropriate terms for such compensation. The Arbitrator sided with the first party and imposed bill and keep terms on both parties. The matter of compensation was clearly "arbitrated."

The arbitration of compensation for ISP-bound traffic was inappropriate and in clear violation of the Commission's own Third Supplemental Order in this proceeding. The Arbitrator's Decision should be rejected or at a minimum modified to remove imposition of bill and keep on ISP-bound traffic. The matter of the appropriate compensation for this particular type of ISP-bound traffic, as a matter of law, must be left to the FCC.

V. The Arbitrator's Decision's gratuitous conclusion that the *ISP Remand Order* imposed bill and keep on all ISP-bound traffic is wrong.

The Arbitrator's Decision gratuitously concludes that the FCC in the *ISP Remand Order* adopted bill and keep for all ISP-bound traffic and not just for ISP-bound traffic

¹⁹ Docket No. UT-023043, Third Supplemental Order Confirming Jurisdiction, October 25, 2002, at page 4.

terminating within the local calling area (Arbitrator's Decision at paragraph's 34 and 35). The conclusion is gratuitous because, as noted earlier, the Arbitrator and the Commission are not in a position to rule upon the intercarrier compensation to be applied to ISP-bound traffic. This is a matter left to the FCC. The Arbitrator's Decision's conclusion as to the scope of the FCC adoption of bill and keep terms is also dead wrong.

There is absolutely nothing in the *ISP Remand Order* to suggest that the FCC intended to apply bill and keep as the form of intercarrier compensation to interexchange ISP-bound traffic. As was discussed previously, prior to the *ISP Remand Order* interexchange ISP-bound traffic was exchanged pursuant to the access charge regime, while local ISP-bound traffic had been exchanged pursuant to state commission determinations. As the D.C. Circuit Court described, the FCC focused upon "calls made to internet service providers ("ISPs") located with the caller's local calling area" (i.e. local ISP-bound traffic). That is because that is the area where the arbitrage problems were occurring. As a consequence the FCC "carved out" local ISP-bound traffic from Section 251 (b) (5) reciprocal compensation requirements.

In the order before us the Federal Communications Commission held that under s 251 (g) of the Act it was authorized to "carve out" from section 251 (b) (5) calls made to internet service providers ("ISPs") located within the caller's local calling areas.²⁰

There were no similar problems with regard to intercarrier compensation for interexchange ISP-bound traffic. Such traffic had always been subject to access charges like all other interexchange traffic. The FCC left the access charge form of intercarrier compensation for interexchange ISP-bound traffic undisturbed in the *ISP Remand Order*.

Congress preserved the pre-Act regulatory treatment of all the access services enumerated under Section 251(g). These services thus remain subject to

²⁰ *WorldCom v. FCC*, 288 F.3d 429, 430 (D.C. Cir. May 3, 2002)

Commission jurisdiction under Section 201 (or, to the extent they are *intrastate* services, they remain subject to the jurisdiction of state commissions) This analysis properly applies to the access services that incumbent LECs provide (either individually or jointly with other local carriers) to connect subscribers with ISPs for Internet-bound traffic... (emphasis added)²¹

On the other hand, the Arbitrator's Decision points to nothing in the *ISP Remand Order* that indicates the FCC intended to displace access charge treatment of interexchange ISP-bound traffic with bill and keep. The best the Arbitrator's Decision can do is to note the following in paragraph 29:

The FCC's *ISP Order on Remand* discusses, at paragraph 34, the agency's view of the impracticability of using the term "local traffic" as a basis to define parties' respective rights and obligations under Section 251 of the Act: "We also refrain from generically describing traffic as "local" traffic because the term "local," not being a statutorily defined category, is particularly susceptible to varying meanings and, significantly, is not a term used in Section 251(b)(5) or Section 251(g)."

Any FCC concern about the use of the term "local traffic" with respect to obligations under Section 251, and the fact that the term "local" is not used in Sections 251 (b) (5) or Section 251 (g) is totally irrelevant to the question at hand. That is because the FCC specifically stated that it was determining intercarrier compensation for ISP-bound traffic under its Section 201 authority and not its Section 251 authority. The distinction between local and interexchange traffic is very much alive and well in the realm of Section 201. Furthermore, although the FCC deleted the term "local" from the Part 51 reciprocal compensation and transport and termination provisions, the term "telecommunications traffic" expressly excludes interstate and intrastate exchange access traffic.²² As a consequence, the Part 51 reciprocal compensation and transport and termination rules do not apply to Level 3's interexchange traffic.

²¹ *ISP Remand Order*, at paragraph 39

²² See 47 C.F.R. §§ 51.701, 51.703.

The Arbitrator's Decision had no basis for concluding that the FCC in the *ISP Remand Order* applied bill and keep to interexchange ISP-bound traffic as well as local ISP-bound traffic.

The Massachusetts Department of Telecommunications and Energy ("Massachusetts Department") recently wrestled with this very same point. In Docket D.T.E. 02-45, Global NAPs, Inc. ("GNAPs") filed a petition for arbitration against Verizon seeking a declaration that GNAPs was not required to pay Verizon access charges when it used Virtual NXX service to deliver Internet-bound calls. GNAPs argued that the *ISP Order on Remand* "changed everything" regarding inter-carrier compensation and the distinctions between local and toll traffic.

The Massachusetts Department rejected GNAPs' argument, holding that the *ISP Order on Remand* did not change or preempt the Massachusetts Department's findings regarding local calling areas. The Department explained that the FCC's order "explicitly recognized that intrastate access regimes in place prior to the Act remain unchanged until further state commission action" and "continues to recognize that calls that travel to points beyond the local exchange are access calls."²³

The unsupported conclusion of the Arbitrator's Decision that bill and keep should apply to all ISP-bound traffic including interexchange calls to ISPs would have a totally unrealistic and impractical result. Obviously any telephone in the United States can dial a number assigned to an ISP. All of these calls, except those originated in the same local calling area as the ISP modem bank, would be interexchange ISP-bound calls. To apply

²³ Petition of Global NAPS, Inc. for arbitration with Verizon Massachusetts, D.T.E. 02-45, Final Order at pp 24 -25 (Mass. Dep't of Telecommunications and Energy).

bill and keep to all of these calls would have an absurd result. As a Vermont Public Service Board ALJ noted, under this logic the CLEC “could declare the entire nation to be its local calling area” and thereby eliminate all access and toll charges.²⁴ Any CLEC serving an ISP would instantly have a bill and keep arrangement with every ILEC in the nation.

Arguments interpreting the scope of the bill and keep provision in the *ISP Remand Order* are more fully developed in the aforementioned attached CenturyTel briefs and are hereby incorporated by reference.

Even if the Commission had jurisdiction to determine the intercarrier compensation for ISP-bound traffic under a Section 252 proceeding (which it does not) the imposition of bill and keep terms on interexchange ISP-bound traffic in the Arbitrator’s Decision should be rejected because it is based upon an unfounded and mistaken interpretation of the *ISP Remand Order*.

VI. Level 3’s attempt to disguise its interexchange traffic as local traffic through the use of Virtual NXX number assignment should have no bearing on these issues.

The bulk of the record in this proceeding involved Level 3’s attempt to get its interexchange ISP-bound traffic categorized and treated as local traffic. CenturyTel’s Post-Hearing brief has extensive discussion as to why the traffic is interexchange and not local. That discussion is hereby incorporated by reference.

In summary, the record showed that even with application of Virtual NXX number assignment, Level 3’s traffic would be delivered to a customer not located in the same local calling area as the party placing the call. The record also showed that Level

²⁴ Petition of Global NAPS, Inc. for Arbitration with Verizon Vermont, Docket No. 6742, Arbitrator’s Order at 22-23 (Vermont Public Service Board Oct. 25, 2002).

3's traffic, for example from Forks to Seattle, would use CenturyTel's network in the same manner as does all other interexchange traffic from Forks to Seattle. A call from a CenturyTel end user in Forks to an ISP in Seattle using 1+ or "800" dialing is the same as a call from that same end user in Forks to that same ISP in Seattle using VNXX dialing. They are both interexchange calls utilizing CenturyTel's network in exactly the same manner.

Based upon the record, the Arbitrator's Decision appropriately did not make a finding that Level 3's Virtual NXX traffic should be categorized as local. The definition of Local Traffic adopted by the Arbitrator's Decision also appropriately did not include Level 3's interexchange Virtual NXX traffic. That definition defines Local traffic as being:

Traffic that is originated by an end user of one Party and terminates to the end user of the other Party within CenturyTel's then current local serving area, including mandatory local calling arrangements. A mandatory local calling area arrangement, ordered by the Commission, is an arrangement that provides end users a local calling area, Extended Area Service (EAS) or Extended Community Calling (ECC), beyond their basic exchange serving area. Local Traffic does not include optional local calling area's (i.e., optional rate packages that permit the end user to choose a local calling area beyond their basic exchange serving area for an additional fee), referred to hereafter as "optional EAS". Pursuant to applicable law, Local Traffic excludes ISP-bound Traffic for purposes of intercarrier compensation.

Level 3's Virtual NXX traffic does not qualify as local traffic under the language in the first sentence because the traffic would not terminate to an end user within CenturyTel's local serving or local calling area. Neither does the final sentence in the definition bring Level 3's Virtual NXX traffic within the definition of local traffic. Level 3's traffic was identified as being ISP-bound traffic. However the final sentence does not add traffic to the definition established in the first sentence. On the contrary, the final sentence is an

exclusion from, and not an addition to the prior established definition of local traffic.

Therefore Level 3's Virtual NXX traffic is not defined as being local traffic.

In spite of this, the Arbitrator's Decision then goes on to treat Level 3's VNXX traffic as if it were local traffic by ordering that it be exchanged on a bill and keep basis. As discussed earlier, this is wrong as it flows from a misinterpretation and misapplication of the *ISP Remand Order*. However, of equal concern is the fact that it is wrong because it prejudices issues associated with Virtual NXX traffic in general. As is discussed in the following section of this Petition, issues with such widespread ramifications should not be settled in a closed two party proceeding.

VII. Policies concerning the treatment of Virtual NXX traffic should instead be established in the Commission's pending general inquiry in Docket No. UT-021569.

The Commission's pending Docket No. UT-021569 is entitled "In the Matter of Developing an Interpretive or Policy Statement relating to the use of Virtual NPA/NXX Calling Patterns." As its title implies, that inquiry is intended to give all interested parties an opportunity to be heard and participate in development of policies that would apply to Virtual NXX traffic. Written comments are due in this docket by January 31, 2003. A workshop is scheduled to be held February 18, 2003.

CenturyTel is certain that a major concern that will be raised and will need to be examined by the Commission in Docket No. UT-021569 will have to do with whether the selected treatment of Virtual NXX traffic will impact the very sustainability of access charges that are so heavily relied upon to contribute to the recovery of costs of local exchange networks. Many and varied parties such as ILECs, IXC's and consumer groups will want to be heard on this issue.

As discussed in the previous section of this Petition, as it currently stands, the Arbitrator's Decision pre-judges the issue of treatment of Virtual NXX traffic. The potential ramifications of a determination that Virtual NXX traffic should be exchanged on a bill and keep basis and therefore not subject to access charges are staggering. No comfort should be taken from the fact that the Arbitrator's Decision in this regard would apply only to ISP-bound traffic. As is already being noted in the FCC's pending inquiry into voice over IP, (WC Docket No. 02-361) a major arbitrage migration of interexchange traffic to ISP-bound dialing would likely occur if the opportunity to avoid access charges in this manner presents itself.

It has already been established elsewhere in this Petition that it is a mistake of law to impose bill and keep terms on the exchange of interexchange ISP-bound traffic in the context of a Section 251/252 proceeding. It would also be bad public policy to pre-judge such a critical issue as the treatment of Virtual NXX traffic in a proceeding closed to all but two parties.

The Arbitrator's Decision should be rejected and the question of treatment of Virtual NXX traffic should be taken up in Docket No. UT-021569 where all interested parties are allowed to participate and potential ramifications of alternative treatments can be examined.

VIII. Proposed alternative agreement language.

Paragraph 45 of the Arbitrator's Decision provides that any party petitioning for review of the Decision must provide alternative language for arbitrated terms that would be affected if the Commission grants the party's petition. CenturyTel's first position in this Petition for Review is that the Commission should find that there is no basis for a

Section 251/252 arbitrated agreement based upon the nature of the traffic Level intends to provide (strictly interexchange ISP-bound traffic). Therefore the most appropriate alternative language is no language and no agreement.

All of this is not to say that CenturyTel does not recognize its obligation to interconnect its network with Level 3's network. CenturyTel has from the beginning expressed its willingness to connect with Level 3 on the same basis that CenturyTel connects with networks of all other interexchange carriers desiring to carry traffic out of CenturyTel's local calling areas. As discussed in the attached briefs incorporated by reference herein, the obligation to connect under Section 251 (a) is no basis for imposing intercarrier compensation provisions under a Section 252 arbitration proceeding.

In the event the Commission determines that there could be some minor amount of non-interexchange traffic exchanged between CenturyTel and Level 3 that legitimately could be subject to a Section 251/252 interconnection agreement, the language adopted in the Arbitrator's Decision could easily be modified to accommodate such traffic. A modified version of the arbitrated language is shown in mark-up form as an attachment to this Petition.

Conclusion

The traffic at issue in this proceeding was identified in the record as being strictly interexchange ISP-bound traffic. In each instance it would involve a call from a CenturyTel customer to a Level 3-served ISP located outside of the CenturyTel local calling area. Intercarrier compensation for such interexchange traffic has never, either before or after the *ISP Remand Order*, been subject to Section 251/252 arbitration. Such traffic has always been dealt with under the access charge regime. Therefore it was error

for the Arbitrator's Decision to remove this interexchange traffic from the access charge regime and instead impose intercarrier compensation terms in a Section 251/252 arbitration forum.

With specific regard to intercarrier compensation for ISP-bound traffic, the FCC in the *ISP Remand Order* has clearly ruled that such compensation is to be determined by the FCC under its Section 201 authority and not by the state commissions under Section 251/252. This Commission has acknowledged that pre-emptive assertion of FCC authority in its Third Supplemental Order in this proceeding. None-the-less the Arbitrator acted to impose upon the parties, terms for intercarrier compensation for ISP-bound traffic in a decision under Section 252. This action is a clearly mistake of law and flies directly in the face of the Commission's own prior order. The Arbitrator's Decision should be reviewed and rejected by the Commission.

The Arbitrator's Decision also for the first time establishes policy concerning treatment of Virtual NXX traffic. The Decision dictates that Level 3's Virtual NXX traffic be exchanged on a bill and keep basis even though such traffic clearly is interexchange. A policy pronouncement with such widespread ramifications should not be established in a Section 252 proceeding that was restricted to only two parties. The Commission has opened Docket UT-021569 specifically to allow a broad-based examination (both in terms of the parties and the issues) of the treatment of Virtual NXX traffic. The Arbitrator's Decision should not be allowed to pre-judge those issues. The

Arbitrator's Decision should be rejected for this reason as well.

Respectfully submitted this 21st day of January 2003.

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